debtor, or, as it is more usually expressed, between giving and taking a preference.[12] The disposition of the court to perpetuate this distinction probably precludes what would otherwise be the simplest and most satisfactory solution of the difficulty.[13]

CONSTRUCTIVE TRUST THEORY AS APPLIED TO PROPERTY ACQUIRED BY CRIME. — If A. has provided that B. is to have certain of his property after A.'s death and B. slays A., does B. acquire the property and if so can he keep it? This question has faced the courts with increasing frequency of recent years.[1] The abundant discussion [2] and criticism of the opposing answers given indicate that no solid ground by which a just result can be reached without judicial gymnastics has yet been generally adopted. The question appears in cases of inheritance, of intestate succession, and of gifts by will. It may also arise out of life insurance policies, as in a recent Minnesota case where the insured was murdered by his wife whom he had made beneficiary of the policy. A brother of the deceased and the murderess were the only heirs under Minnesota law. The court held that the brother could recover in an action on the policy.[3]

The killing in any case may have been intentional, in the heat of blood, negligent, or accidental. Death by accident is dismissed from consideration. That the insane heir may inherit and pass to her heirs the property of her victim was held recently by a Canadian court.[4] This result is clearly right, for no crime[5] was committed according to the view taken of insanity. It may well be argued that only a killing with the purpose of hastening the acquirement of property should deprive one of enjoying its

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[12] See Prof. Samuel Williston, "Transfers of After-Acquired Personalty," 19 HARV. L. REV. 557, 577. The source of the distinction is perhaps traceable to the Bankruptcy Act of 1867, under which clearly only preferences which the debtor took an active part in bringing about were voidable. See U. S. REV. STAT. 1875, § 5128.

[13] Most satisfactory, because on the other line of attack the section does not cover the case in which the creditor becomes aware of the debtor's insolvency after the entry of the judgment but before the execution sale. The section could be amended with profit somewhat as follows: A sale on execution shall be deemed a transfer within the meaning of this section, if, and only if, the levy of execution has taken place within four months of the filing of the petition in bankruptcy, or after the filing of the petition and before the adjudication.

[1] For the provisions of continental codes on this subject attention is called to an article by J. Chadwick in 30 L. QUART. REV. 210. On the question whether their effect is to prevent the criminal from taking, or is to allow him to take property and thereafter be deprived of it, see 8 HARV. L. REV. 170.

[2] AMES, LECTURES ON LEGAL HISTORY, 310, reprinting an article in 36 AM. L. REG. (N. S.) 225; 25 IR. LAW TIMES, 423 and 433; 29 CENT. L. J. 461; 32 *Ibid.* 333; 34 *Ibid.* 247; 39 *Ibid.* 217; 41 *Ibid.* 377; 4 HARV. L. REV. 394; 8 *Ibid.* 170; 24 *Ibid.* 227.

[3] Sharpless *v.* Grand Lodge A. O. U. W., 159 N. W. 1086 (Minn.).

[4] *Re* Estate of Maude Mason, 31 Dom. L. R. 305 (Br. Col.). Accord, *In re* Houghton, [1915] 2 Ch. 173; Holdom *v.* Grand Lodge A. O. U. W., 159 Ill. 619, 43 N. E. 772 (insane beneficiary does not forfeit policy and is not barred from his right to sue).

[5] Crime, either felony or misdemeanor, is the adopted test of the English and Canadian courts. See *In re* Houghton, *supra;* Estate of Hall, [1914] P. 1, 8; Cleaver *v.* Mutual Life Fund Association, [1892] 1 Q. B. 147, 156; Lundy *v.* Lundy, 24 Can. Sup. Ct. 650. *Cf.* also the language of Earl, J., "He can not vest himself with title by crime." Riggs *v.* Palmer, 115 N. Y. 506, 513, 22 N. E. 188, 190.

benefits.[6] But practical difficulties of proving purpose at once suggest themselves, urging the establishment of a rule that any intentional killing which constitutes murder should demand intervention by the courts on the question of ownership.[7] The cases are not in accord as to manslaughter,[8] but it seems clear that no court should take or keep property from a claimant who has killed another negligently or in the heat of blood.[9]

There is a strong public policy against allowing a murderer to enjoy the benefits of property formerly owned by his victim.[10] To satisfy this policy the English courts hold that a slayer cannot take by will [11] or inherit [12] property at law. Several American courts have likewise read disqualifications into the unambiguous terms of their statutes of descent and distribution.[13] Two of these courts have abandoned this

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[6] Gollnik *v.* Mengel, 112 Minn. 349, 128 N. W. 292; *In re* Wolf, 88 N. Y. Misc. 433, 150 N. Y. Supp. 738.

[7] No attempt is here made to formulate a rule as to the admissibility in evidence of a prior conviction or the weight to be given it if admitted. For what little the cases have said on these matters see Schreiner *v.* High Court of I. C. O. of F., 35 Ill. App. 576, 579; *In re* Wolf, 88 N. Y. Misc. 433, 439, 150 N. Y. Supp. 738, 741; Estate of Hall, [1914] P. 1, 4, 7; Estate of Crippen, [1911] P. 108, 115; Yates *v.* Kyffen-Taylor, [1899] 2 W. N. 141; M'Kinnon *v.* Lundy, 24 Ont. 132, 143. *In re* Cash, 30 N. Z. L. 577, holds that the record of conviction is *prima facie* evidence. See also Prather *v.* Michigan Mutual Life Association, Fed. Cas. 11, 368, in which Gresham, D. J., charged the jury that the preponderance and not the reasonable doubt test is applicable.

[8] Under the English rule manslaughter disqualifies a legatee (Estate of Hall, *supra*), a devisee (Lundy *v.* Lundy, *supra*), and presumably an heir or beneficiary.

One who intended to kill A. but in fact killed B. was convicted of manslaughter and later allowed to take and keep property inherited from B. *In re* Wolf, *supra*.

[9] "No homicide which is the result of carelessness or which is not an intentional killing should bar the plaintiff's rights to the money on her certificate." Moran, J., in Schreiner *v.* High Court of I. C. O. of F., *supra*.

[10] Fry, L. J., in Cleaver *v.* Mutual Life Fund Association, *supra*, said, "The principle of public policy invoked is in my opinion rightly asserted. It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanor." *Cf.* the language of Field, J., in Mutual Life Ins. Co. *v.* Armstrong, 117 U. S. 591, 600, "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a person whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired." (For a criticism of the use of the analogy to fire insurance, see 24 HARV. L. REV. 227, 228.)

In discussing the manner in which public policy should bar a murderer, the books make frequent references to an early English case in which it was held that the assignee of Faulkner, who had committed forgery and was later executed for his crime, could not recover from the insurers on a policy issued to Faulkner. The ground of the decision was that the risk of such a death if expressly assumed by the insurers would have made the policy void. Amicable Society *v.* Bolland, 4 Bli. (N. S.) 194.

[11] Estate of Hall, *supra*.

[12] Estate of Crippen, *supra*. The Probate Court refused to accept Ethel LeNeve, the executor named by the murderer Crippen, and appointed another as administrator of the deceased wife's estate "on the sister's behalf." It was decreed in the case of *In re* Cash, *supra*, that the Public Trustee stand possessed for the "next of kin other than the defendant" murderer who would have succeeded under the Administrative Act and was then serving a life sentence.

[13] Riggs *v.* Palmer, *supra*, holding that Elmer, because he murdered his grandfather, could take neither as heir nor as legatee. Shellenberger *v.* Ransom, 31 Neb. 61, 47 N. W. 700, reversed in 41 Neb. 631, 59 N. W. 935 (heir guilty of murder); Wall *v.*

position.[14] The rule of disqualification when applied to wills, can be explained only by presuming that the victim would not want his murderer to receive the legacy declared before the crime in a properly executed instrument. But this is flying in the face of the statutes of wills, which specify the only methods by which a will can be revoked.[15] Moreover, a counter presumption arises if the victim lingers on after receiving the wound,[16] and if he orally expresses his forgiveness the rule of disqualification must still bar the criminal under English law.[17] With more accuracy other courts have held that the murderer can inherit or take by will. But they then declared without justification that they lacked power to effect the ends of justice, and have allowed the murderer to keep the property,[18] thus forcing the matter into the legislatures.[19]

The error in both lines of decisions has grown out of beclouding the fundamental distinction between law and equity.[20] This is due in great part to the almost universal practice today under which the two branches are administered by the same tribunal with the same procedure. But the

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Pfanschmidt, 265 Ill. 180, 106 N. E. 785 (statutory heir guilty of murder); Perry *v.* Strawbridge, 209 Mo. 621, 108 S. W. 641. In Box *v.* Lanier, 112 Tenn. 393, 79 S. W. 1042, a husband guilty of murdering his wife was precluded from taking as heir under the common-law right of survivorship existing in Tennessee. The case arose prior to the statute mentioned in note 19, *infra*. See also note 32, *infra*.

[14] Ellerson *v.* Westcott, 148 N. Y. 149, 42 N. E. 540, holding that the murderer takes and the heir's remedy is in equity. Shellenberger *v.* Ransom, *supra*, holding on second hearing that the murderer could take and keep the property.

[15] See Prof. Ames' article, LECTURES ON LEGAL HISTORY, 310, 312, 36 AM. L. REG. (N. S.) 225, 227.

[16] See Taschereau, J., dissenting, in Lundy *v.* Lundy, *supra*.

[17] See J. Chadwick in 30 L. QUART. REV. 211, 213.

[18] *In re* Carpenter's Estate, 170 Pa. St. 203, 32 Atl. 636 (son guilty of murder); Deem *v.* Milliken, 6 Oh. C. C. 357, affirmed and opinion adopted in 53 Oh. St. 668, 44 N. E. 1134 (son guilty of murder); Shellenberger *v.* Ransom, *supra;* Owens *v.* Owens, 100 N. C. 240, 6 S. E. 794 (wife accessory before fact to murder); Gollnik *v.* Mengel, *supra* (second degree murder); McAllister *v.* Fair, 72 Kan. 533, 84 Pac. 112 (husband statutory heir, guilty of murder); De Graffenreid *v.* Iowa Land & Trust Co., 20 Okla. 687, 95 Pac. 624 (murder by heir, motive not acquisition of property. *Dictum* at p. 728 to effect that decision would have been same if purpose had been to gain immediate rights); Holloway *v.* McCormick, 41 Okla. 1, 136 Pac. 1111 (like preceding case).

[19] The following statutes have been passed in effect barring a murderer from acquiring rights in property by inheritance or will from his victim: DEERING, CIV. CODE CAL. 1915, § 1409 (not applicable to manslaughter. *In re* Kirby's Estate, 162 Cal. 91, 121 Pac. 370); 2 BURNS' ANN. IND. STAT. 1914, § 2995 (conviction necessary. Bruns *v.* Cope, 182 Ind. 289, 105 N. E. 471. Does not deprive widow of statutory share in personalty payable out of estate. *In re* Merte's Estate, 181 Ind. 478, 104 N. E. 753); IOWA CODE, SUPP. 1913, § 3386 (does not deprive widow of share in estate she acquires under a statute as matter of contract and of right, and not by inheritance. *In re* Kuhn's Estate, 125 Iowa 449, 101 N. W. 151); DASSLER GEN. STATS. KAN. 1909, § 2967; PELL'S REVISAL OF 1908, N. C., § 7; TENN. ACTS OF 1905, c. 11, p. 22; COMP. LAWS OF UTAH, 1907, § 2823.

The constitutionality of such statutes has not yet been passed upon in any of the jurisdictions. The question was expressly left undecided in *In re* Merte's Estate, *supra*. For what has been said regarding the effect of the Bills of Rights in federal and state constitutions, forbidding forfeiture of property for crime, upon the decisions herein considered, see *In re* Carpenter's Estate, *supra;* Deem *v.* Milliken, 6 Oh. C. C. 357, 361, 362; McAllister *v.* Fair, 72 Kan. 533, 536, 84 Pac. 112, 113; Collins *v.* Metropolitan Life Ins. Co., 232 Ill. 37, 40, 83 N. E. 542, 543; Perry *v.* Strawbridge, *supra;* Shellenberger *v.* Ransom, 31 Neb. 61, 73, 47 N. W. 700, 704; Beddingfield *v.* Estill, 118 Tenn. 39, 50, 100 S. W. 108, 111.

[20] See the opening paragraphs of Prof. Ames' article, *supra*.

keynote to the correct solution has often been struck by courts which failed to recognize what followed from their statement that no man shall profit by his wrongdoing.[21]

It is fundamental that equity will not allow unjust enrichment, and to prevent this equity has long imposed constructive trusts. Thus, when property is acquired by fraud or duress, equity will decree that title be given up.[22] Surely a murderer stands in a more unconscionable position than such title holders, although had the murderer allowed his victim to live on he would probably in time have received the same property. There is as a rule no workable method for taking from a murderer just so much as he has been enriched, *viz.*, a term for years equal to the period that his victim would have lived. Where mortality tables can accomplish this result in a practical fashion [23] it is submitted that such a method should supersede any herein suggested.[24]

The difficult problem in the constructive trust remedy, and the one which has not been deciphered thoroughly, is — to whom shall the property be given by equity after adopting the hypothesis that one who has been unjustly enriched should be decreed to make compensation in specie? Logically, all persons who might have shared in the victim's bounty have a claim to be heard,[25] since their chances, always of some actual value, have been destroyed. But to divide an estate into many fractional parts, according to the proportionate worth of each claimant's chances, might destroy all unity in the holding of the decedent's property and substantially benefit no one. Equity must look for the person or class of persons who in the greatest likelihood would have taken but for the existence and activity of the murderer.

Nearly always the victim's heirs and next of kin will stand in this position. But the deceased may have provided for a third person in case his devisee should predecease him. To give such third person the property will accomplish justice, since he was wronged more than the heirs of the testator. On the other hand, if an insurance policy taken out by the insured names as beneficiary the murderer or his executors, neither the murderer nor, when he has been punished by death, his executors, whose only claim lies as the continuing person of the deceased, should keep any money paid by the company. It should go to the estate of the insured

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[21] Thus Earl, J., in Riggs *v.* Palmer, *supra*, says, at p. 511, "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."

See the learned opinions of Start, C. J., and Elliott, J., in Wellner *v.* Eckstein, 105 Minn. 444, 117 N. W. 831, in which case the court agreed that a constructive trust should be imposed in the devise and insurance cases, but were divided as to the case of statutory inheritance.

[22] Dixon *v.* Olmius, 1 Cox Eq. 414, decided by Lord Thurlow in 1787.

[23] For example, if a vested remainderman murders the life tenant, thus taking the fee at once, a constructive trust should be imposed upon him in favor of the heirs of the life tenant for the number of years he would have lived according to the mortality tables.

[24] See AMES, LECTURES ON LEGAL HISTORY, 310, 320, 321, 36 AM. L. REG. (N. S.) 225, 237, 238.

[25] "In a word, it appears to me that the crime of one person may prevent that person from the assertion of what would otherwise be a right, and may accelerate or beneficially affect the rights of third persons, but can never prejudice or injuriously affect those rights." Fry, L. J., in Cleaver *v.* Mutual Reserve Fund Life Ass'n, *supra*.

for the benefit of his next of kin except the murderer. One should not be allowed to exercise rights acquired *from a murderer*.[26]

Suppose, however, that in a jurisdiction where primogeniture prevails for the inheritance of land an eldest son, himself having an eldest son, murders his father. The policy of one-man ownership will best be protected by saying that the victim's grandson and not the murderer's brothers shall be given the family estate. Moreover, the grandson from birth was in a position where he would claim either through his father (should the latter survive the grandfather) or direct from the grandfather (should the father be first to die). Thus his position is different from that of the personal representatives of a dead man. The grandson should therefore be decreed the legal and beneficial interest in the land. The fact that legal title has come *through a murderer* should not of itself disqualify one from holding interests at law or in equity.

To accomplish such results as are exemplified by the cases suggested above, the following is submitted as the nearest approach to a rule of thumb which could or should be made to guide the action of the equity court. If the present holder of a legal title, or that person solely because of whose prior existing claim the present owner derives his right, hastened the acquirement of the property by murdering the former owner: decree through the medium of a constructive trust that he convey his title to that person or class of persons who would have taken had the murderer predeceased his victim.

In the life insurance cases where no statutes of descent or distribution are before the courts they have more often reached correct results. The decisions quite generally hold that the company is not excused by the fact that death resulted from the felonious act of the beneficiary.[27] To decide otherwise would enrich the company unjustly, since murders are taken into account in the calculation of rates, etc. No case has held that the murderer, his representatives or assigns,[28] can keep the money. The result in all cases has been a payment ordered to the heirs [29] or personal representatives [30] of the insured, if parties to the action.[31] However, it must be borne in mind that a policy to the making of which the insured

[26] "I think that the rule of public policy should be applied so as to exclude from benefit the criminal and all claiming under her, but not so as to exclude alternative or independent rights." Fry, L. J., in Cleaver *v.* Mutual Reserve Fund Life Ass'n, *supra.*

[27] For this point all cases in notes 29 and 30, *infra*, are authorities. *Contra*, McAlpine *v.* Fidelity & Casualty Co., 158 N. W. 967 (1916, Minn.). See Schreiner *v.* High Court of I. C. O. of F., 35 Ill. App. 576, 581; 1 MINN. L. REV. 66.

[28] The Supreme Court of the United States, in New York Mutual Life Ins. Co. *v.* Armstrong, *supra*, held that it was error, in an action brought by the representatives of the assignee of the policy, to exclude evidence that the assignee "caused the death of the insured by felonious means," since that "must necessarily have defeated a recovery."

[29] Supreme Lodge *v.* Menkhausen, 209 Ill. 277, 70 N. E. 567; Sharpless *v.* Grand Lodge A. O. U. W., *supra.*

[30] The leading case of Cleaver *v.* Mutual Reserve Fund Life Ass'n, *supra*, held that a trust created in the insured and his executors in favor of the wife named as beneficiary was destroyed when she murdered her husband, and that a "resulting trust in favor of the estate of the insured" arose. To the same effect are Schmidt *v.* Northern Life Ass'n, 112 Iowa 41, 83 N. E. 800; Anderson *v.* Life Ins. Co., 152 N. C. 1, 67 S. E. 53.

[31] In a suit at law by the beneficiary the company's plea that the beneficiary murdered the insured was held good on demurrer. Filmore *v.* Metropolitan Life Ins. Co., 82 Oh. St. 208, 92 N. E. 26.

was not a party and upon which he himself paid no premiums should not furnish a source of unjust enrichment to his estate. In such a case the company should be relieved from any liability further than a repayment of premiums. For if the beneficiary who at law has the only right in the *chose* in action is barred by his crime from reaping its benefits, any disposition of money, just as of lands and chattels willed or inherited, must be made on equitable principles and only to such persons as have been unjustly impoverished.[32]

THE CODE OF MARITIME NEUTRALITY. — A newly completed code of rules of maritime neutrality was submitted recently to the American Institute of International Law, and by it referred to the national societies of international law in the twenty-one American republics.[1] The thirty-four articles of the Code consistently display an attitude and present a method of approach new, in this intensity, to international law. The high tide of belligerent aggression in the present war has brought about what is perhaps the sharpest and most violent neutral reaction in the history of international law.

Article 1, defining neutrality, sounds the keynote of the Code by formulating and stating in keenly insistent language what is certainly generally admitted to be the true relation of neutral governments to belligerents.[2] Article 2, a general declaration though it is, contains the first sharp variance from established principles, in the imposition on neutral governments of a duty to "refrain from increasing the number of belligerents," and indeed more, "a duty of pacification toward mankind." [3]

The chapter entitled Freedom of Commerce in Time of War contains two of the most considerable differences from existing international

[32] As regards the effect of homicide upon dower rights and the rights of tenants by the entireties see, in addition to cases in note 19, *supra*, Box *v.* Lanier, *supra;* Beddingfield *v.* Estill, 118 Tenn. 39, 50, 100 S. W. 108, 111; and Lucas *v.* Harris, an unreported Tennessee case outlined in 118 Tenn. 39, 50.

[1] In THE CHRISTIAN SCIENCE MONITOR for January 25, 1917, the Code was published in full, with the following introduction, telegraphed from Washington: "A code of rules of maritime neutrality which should govern the relations between belligerents and neutrals, prepared on the recommendation of Secretary Lansing, is to be submitted to the American Institute of International Law today in session at Havana, Cuba. The code was drafted by Dr. Alejandro Alvarez, secretary-general of the institute, and who formerly was jurisconsult of the Chilean Foreign Office and counselor to Chilean legations abroad. The code will be referred to the National Society of International Law in each of the 21 American republics, and final action on the code will be taken by the institute at its next annual meeting."

It is understood that Dr. James Brown Scott, who presided at the meeting of the Institute, has at present in course of preparation an analysis of the Code.

[2] The term "belligerent" is used throughout this note to indicate a belligerent power.

[3] See 2 WESTLAKE, INTERNATIONAL LAW, 2 ed., 190 *et seq.* The first paragraph of Westlake corresponds largely to the definition of neutrality in Article 1 of the Code; but the succeeding paragraph is radically different in spirit and in substance from Article 2. Thus: "We may sum up by saying that neutrality is not morally justifiable unless intervention in the war is unlikely to promote justice, or would only do so at a ruinous cost to the neutral."

Cf. 4 CALVO, LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE, 5 ed., §§ 2491 *et seq.*